

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Application of)
)
CITY OF BOYNTON BEACH, FLORIDA) WNCE606
) File No. 0003791939
)
)
)

MEMORANDUM OPINION AND ORDER

Adopted: April 29, 2010

Released: April 29, 2010

By the Deputy Chief, Policy Division, Public Safety and Homeland Security Bureau:

1. On May 17, 2009, the State of Florida (Florida) filed a petition for reconsideration of the grant of the above-captioned application to the City of Boynton Beach, Florida (Boynton Beach).¹ For the reasons set forth below, we dismiss the Petition.

2. *Background.* The Commission granted Boynton Beach's application to modify the facilities of its trunked Public Safety Pool station WNCE606 to add frequency 854.1125 MHz.² Florida asserts that two of Boynton Beach's facilities on that frequency will cause interference to two sites of Florida's nearby station WQBU882, which operates on the 12.5 kHz offset frequency 854.1250 MHz.³ Florida concedes that the Commission's rules do not provide offset stations with protection against interference from stations operating on non-offset channels.⁴ Florida contends, however, that the Commission should amend its rules to adopt certain interference protection criteria for offset stations.⁵ Because Boynton Beach's operations do not meet Florida's suggested interference criteria, Florida

¹ See Petition for Reconsideration filed on May 17, 2009 by the State of Florida (Petition).

² The modification application was filed in accordance with the procedures set forth in a December 29, 2008 public notice. See Public Safety and Homeland Security Bureau Announces Application and Licensing Procedures for Channels Relinquished by Sprint Nextel Corporation in the 809-809.5/854-854.5 MHz Band, *Public Notice*, 23 FCC Rcd 18343 (2008). The application specified spectrum that became available as a result of the 800 MHz band reconfiguration process. See Improving Public Safety Communications in the 800 MHz Band, *Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order*, 19 FCC Rcd 14969 (2004) (800 MHz *Report and Order*); Improving Public Safety Communications in the 800 MHz Band, *Supplemental Order and Order on Reconsideration*, 19 FCC Rcd 25120 (2004) (800 MHz *Supplemental Order*); Improving Public Safety Communications in the 800 MHz Band, *Memorandum Opinion and Order*, 20 FCC Rcd 16015 (2005).

³ Florida considers WQBU882 a critical part of its Statewide Law Enforcement Radio System (SLERS), a network currently authorized to use certain 12.5 kHz offset frequencies at numerous sites throughout the state. Petition at 1. The facilities using offset operation have been licensed pursuant to waivers. See, e.g., State of Florida, *Memorandum Opinion and Order*, 16 FCC Rcd 2174 (WTB 2001) (2001 Waiver Order); State of Florida, *Memorandum Opinion and Order*, 18 FCC Rcd 3843 (WTB 2003); State of Florida, *Order*, 23 FCC Rcd 1636 (PSHSB 2008). But see State of Florida, *Order*, 22 FCC Rcd 1782 (PSHSB 2007). (Denying waiver request in which Florida contended that Telecommunications Industries Association TSB-88 methodology demonstrated that Florida's proposed offset channel operations would not cause interference to incumbent stations operating on standard channels.)

⁴ Petition at 1.

⁵ *Id.* at 2-3.

requests that the Commission rescind Boynton Beach's authorization to operate WNCE606 on frequency 854.1125 MHz.⁶

3. *Discussion.* Section 1.106(e) of the Rules⁷ requires that any petition for reconsideration based on a claim of interference must be accompanied by an affidavit of a qualified radio engineer showing that interference will occur. Florida has not provided such an affidavit with its Petition.⁸ Section 1.106(f) of the Rules⁹ requires that petitions for reconsideration must be served "upon parties to the proceeding." The record does not disclose that Florida served its Petition on Boynton Beach. Moreover, it is well established that petitions for reconsideration must demonstrate a material error or omission in the underlying action.¹⁰ Florida, however, does not argue that the staff erred when it granted the modification application consistent with the Rules; it contends that the Rules themselves should be changed. A petition for reconsideration is an inappropriate pleading for seeking a rule change. If Florida sought to have the Rules changed in the manner set out in its Petition, it should have submitted a petition for rule making pursuant to Sections 1.401 *et seq.* of the Rules.¹¹

3. Had we not found Florida's Petition procedurally defective, we would have denied it on substantive grounds. In its cited waiver requests to use offset channels,¹² Florida stated that it was the licensee of the channels above and below the offset channels and had configured its network so that 12.5 kHz offset operation would not result in inter-network interference.¹³ Thus, the Commission's staff concluded that "grant of Florida's [waiver] request would not result in harmful interference to other current or future licensees because Florida is the licensee of the regularly assignable channel on each side of each of the offset channels requested . . ."¹⁴ That circumstance – Florida being the licensee of the channel above and below the offset channel – is not present here because Boynton Beach, not Florida, is the licensee of the channel immediately below Florida's offset channel. Thus, the premises underlying grant of Florida's waivers, *i.e.*, the lack of "harmful interference to . . . future licensees," and Florida's ability to manage interference to and from its offset channel operations are inapplicable to the instant case. Accordingly, because: (a) the Rules do not provide interference protection to offset channels, and (b) those channels must not cause interference to licensees operating on non-offset channels, we have no grounds on which to rescind Boynton Beach's authorization as Florida requests.

4. *Decision.* Florida's Petition is procedurally defective and subject to dismissal for that reason. Were it considered on its merits the Petition would not warrant the relief requested.

⁶ *Id.* at 3.

⁷ 47 C.F.R. § 1.106(e).

⁸ See Pamplin Broadcasting, Inc., *Memorandum Opinion and Order*, 23 FCC Rcd 2571, 2572 ¶ 3 (2008); see also Tadlock's Radio Dispatch, *Memorandum Opinion and Order*, 8 FCC Rcd 197 (1967) (Commission is not required to consider a petition which does not comply with the requirements of Section § 1.106(e) of the Rules).

⁹ 47 C.F.R. § 1.106(f).

¹⁰ See *WWIZ, Inc.*, 37 FCC 685, 686 ¶ 2 (1964), *aff'd sub. nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

¹¹ 47 C.F.R. §§ 1.401 *et seq.* We note that, on April 29, 2009, the Enterprise Wireless Alliance filed a rule making petition seeking the establishment of offset channels in the 800 MHz band and recommending interference protection criteria therefor. See Public Safety And Homeland Security Bureau And Wireless Telecommunications Bureau Seek Comment On The Petition By Enterprise Wireless Alliance Requesting The Creation Of New, Full Power, Interstitial 12.5 KHz Channels In The 800 MHz Band, *Public Notice*, 24 FCC Rcd 12461 (2009).

¹² See *supra* n.3.

¹³ See 2001 Waiver Order, 16 FCC Rcd at 2176.

¹⁴ *Id.* at 2179.

5. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the petition for reconsideration filed by the State of Florida on May 17, 2009 regarding Application File No. 0003791939 IS DISMISSED.

6. This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

FEDERAL COMMUNICATIONS COMMISSION

Michael J. Wilhelm
Deputy Chief - Policy Division
Public Safety and Homeland Security Bureau